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IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

THOMAS DAVID JORDAN,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Tennessee

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 78

[1] In accordance with Rule 37.2(a), AAR has provided notice of its intent to file this brief to counsel for petitioner and respondent. The parties consented to AAR's filing of an *amicus* brief. Letters expressing consent have been filed with the Clerk of the Court. No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry, including participation as *amicus curiae* in cases raising significant legal and policy issues. This case, arising under the Federal Employers Liability Act (FELA), 45 U.S.C. §§51-60, presents such an issue.

FELA, a federal negligence statute, takes the place of workers' compensation in the railroad industry. FELA presents unique issues and problems for railroads because, as a negligence law, it differs fundamentally from the no-fault compensation systems that cover virtually all other U.S. industries. Each year thousands of FELA claims and lawsuits, like the case below, are asserted against AAR member railroads, to which they devote substantial legal and financial resources: all told, the railroads spend about three quarters of a billion dollars annually in the payment and defense of claims brought under FELA. Because FELA litigation is an ongoing event for all major railroads, AAR has a strong interest in assuring that lower courts do not improperly expand railroad liability under FELA.

Echoing prior decisions of some other lower courts, the court below erroneously sanctioned the application of a relaxed standard of causation in FELA cases, a ruling that is at odds with the plain language of the statute, Congressional intent and prior decisions of this Court and other courts. Confusion and disagreement over the proper standard of causation (and, for that matter, negligence) have existed for decades in the lower courts and show no sign of

abating. These issues are relevant in virtually every FELA lawsuit, and the way in which they are interpreted by courts can affect the outcome of a case. Therefore, AAR members, who make up the vast majority of FELA defendants, have a strong interest in seeking definitive guidance from this Court on the standard of causation.

When AAR participates as *amicus curiae* in a FELA case, it brings a broad, industry-wide perspective to the issue before the court. AAR works closely with its member railroads on a host of issues arising under FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of over 900 attorneys representing railroads nationwide in personal injury litigation. Thus, AAR is thoroughly familiar with the trends and key issues that confront its members in FELA litigation. As a trade association representing the nation's major railroads, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

STATEMENT OF THE CASE

AAR adopts the Statement of the Case of Petitioner.

SUMMARY OF THE ARGUMENT

This Court should grant the petition in order to provide guidance on a fundamental issue arising under FELA that has been the source of confusion and lack of uniformity for many years: the proper standard of causation. Time and again, in providing jury instructions, ruling on dispositive motions, and in reviewing such matters on appeal, some lower

courts have held that a more "relaxed" burden applies to plaintiffs in proving causation in FELA cases than would in an ordinary common law action. Many of those decisions demonstrate that how courts interpret this concept can have a significant impact on the outcome of a case. In contrast, other courts hold that FELA plaintiffs must show proximate cause. Only clarification of the proper standard of causation by this Court will end the intolerable lack of uniformity on this fundamental issue.

The language of the statute, the legislative history and early decisions of this Court show that Congress did not intend to modify the common law standard of causation when it enacted FELA in 1908. Congress expressly modified some of the prevailing common law defenses that made recovery more difficult, including the traditional contributory negligence doctrine, but these modifications did not address the causation standard. Consequently, in the years following FELA's enactment this Court consistently held that plaintiffs had to prove their injuries were proximately caused by the defendant's negligence. Neither subsequent amendments to FELA, nor this Court's decision In *Rogers v. Missouri Pac. R.R.*, offers support for lower court decisions that hold otherwise.

ARGUMENT

THIS COURT SHOULD GRANT THE PETITION AND CLARIFY THE PROPER STANDARD OF CAUSATION AND NEGLIGENCE UNDER FELA BECAUSE THEY ARE FUNDAMENTAL ISSUES ARISING UNDER THE STATUTE WHICH CONTINUE TO BE THE SUBJECT OF CONFUSION AND LACK OF UNIFORMITY IN THE LOWER COURTS

One hundred years after FELA's enactment, lower courts are confused and divided over a fundamental element of every cause of action brought under this important federal statute. The time is long due for this Court to address the issue of the proper standard of causation under FELA, a question which it broached, but ultimately did not address, in *Norfolk Southern Ry. Co. v. Sorrell*, 459 U. S. 158 (2007). While there was little controversy over this issue during the first half century after FELA's enactment, the subsequent fifty years has seen confusion and inconsistency. As the California Court of Appeals observed, "[i]t is almost impossible to frame a definition of causation for F.E.L.A. cases . . . because the federal decisions cannot themselves be fully harmonized on the subject." *Parker v. Atchison, Topeka & Santa Fe Ry. Co.*, 263 Cal.App.2d 675, 678, 70 Cal. Rptr. 8, 10 (Cal. App. 1968). Moreover, as with the standard of causation, the standard of negligence under FELA also is the subject of confusion and absence of uniformity. "There is a federal circuit split as to whether the relaxed FELA standard applies only to causation, or applies to the fault prong of FELA negligence as well." *Montgomery v. CSX Transp., Inc.*, 376 S.E.2d 20, 26 (S.C. 2008). A relaxed standard applies neither to negligence or causation.

A. The Erroneous Interpretation of FELA's Causation Standard by the Court Below and Other Lower Courts Has and Will Continue to Have A Real Impact on the Outcome of FELA Cases

As Petitioner explains, a transformation has occurred in FELA jurisprudence over the past fifty years to the point where there is a serious split of authority in the lower courts on the standard of causation [Pet. at 11-14] and negligence [Pet. at 15-18] that applies in FELA cases. Typically, courts erroneously ascribe to this Court's decision in *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, *reh'g denied*, 353 U.S. 943 (1957), an intent to "relax" the standard of causation under FELA, often utilizing colorful metaphors to describe this alleged statutory metamorphosis.[2] For example, the Seventh Circuit explained that to sustain a jury verdict in a FELA case requires "evidence scarcely more substantial than pigeon bone broth." *Harbin v. Burlington Northern R.R.*, 921 F.2d 129, 132 (7th Cir. 1990); *see also*, *Rivera v. Union Pac. R.R.*, 378 F.3d 502, 506 (5th Cir. 2004) (calling the plaintiff's burden of proof "featherweight").

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[2] *E.g.*, *Williams v. Long Island R.R.*, 196 F.3d 402, 406 (2nd Cir. 1999); *Oglesby v. Southern Pac. Transp. Co.*, 6 F.3d 603, 606-07 (9th Cir. 1993); *Beeber v. Norfolk Southern Corp.*, 754 F. Supp. 1364, 1372-73 (N.D. Ind. 1990). The Second Circuit has interpreted *Rogers* as granting a license for even further judicial amendment of FELA, explaining that while "[t]he Supreme Court has not expressly held that a relaxed standard of negligence, as distinguished from causation, applies under FELA [citation omitted] [ ] numerous appellate courts, including ours, have construed the statute, in light of its broad remedial nature, as creating a relaxed standard for negligence as well as causation." *Uflik v. Metro-North Comm. R.R.*, 77 F.3d 54, 58, n.1 (2nd Cir. 1996).

The petition aptly notes that the deep split among lower courts that has emerged since *Rogers* was decided has resulted in "a half-century's worth of disarray among federal and state courts alike." Pet. at 3. Moreover, this is "disarray" that makes a difference. When a court employs erroneous standards governing the essential elements of a civil action, either in formulating jury instructions or ruling on dispositive motions, it can affect the outcome of the case. This point was recently underscored by a district court which, referring to FELA's purported "relaxed standard for proving causation," explained that while the plaintiff's "first claim might not survive a motion for summary judgment in the traditional tort context, the low negligence threshold of FELA ensures that this count will live to see another day." *Gibbs v. Union Pac. R.R.*, 2009 WL 3064956, at *4 (S.D. Ill. 2009).

The Fifth Circuit's opinion in *Armstrong v. Kansas City Southern Ry. Co.*, 752 F.2d 1110 (5th Cir. 1985) offers a vivid illustration of how the standard of causation applied by a court can be outcome determinative. The railroad had hired a local cab company to transport the plaintiff from the point where he disembarked from a train late at night to the railroad's yard offices. In route, the driver stopped the cab on the road without turning on the emergency flashers. The cab was hit from the rear by another motorist, injuring the plaintiff. Asserting that the "common-law proximate cause standard is modified and the employee has a less demanding burden of proving causal relationship," *id.* at 1113, the Court affirmed the jury's verdict finding the railroad liable, allowing the jury a wide berth to make inferences supporting its verdict.

The case also involved a state law indemnity action by the railroad against the cab company, its agent.[3] Under the very same set of facts, the Court of Appeals affirmed the denial of the railroad's claim, upholding the lower court's finding that the cab driver was not negligent. The Court held that "even though the jury found that [defendant] was liable to Armstrong [in the FELA action] because of the negligent conduct of its agent, the district court was neither constrained nor required to find the negligence of [the cab company] proximately caused Armstrong's injury." *Id.* at 1115. The Court explained that the railroad's "argument ignores the different causation standards of the two actions . . . The standards of liability for negligence under §1 of [FELA] are significantly broader than in ordinary common-law negligence actions." *Id.* Thus, the very conduct that gave rise to liability in the FELA action, did not support liability in the indemnity action, an outcome directly attributable to the Court's ruling that a different, "significantly broader" standard of causation applies under FELA. *Id.*

Not only does the *Armstrong* decision demonstrate starkly how applying a relaxed causation standard can affect the outcome of a case, it highlights the inherent unfairness of such a rule. *Ayers* suggests that the impact of holding railroads jointly liable for the negligence of other tortfeasors is mitigated by the railroads' right to seek indemnity under state law. However, the fairness of this balance is undermined

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[3] In *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135 (2003), this Court held that while joint and several liability applies to FELA, railroads have the right to bring indemnity and contribution actions against third parties under applicable state or federal law. *Id.* at 162.

if railroads face a relaxed standard of causation as FELA defendants, but must prove proximate cause as indemnity plaintiffs.

Other examples of the impact of FELA's purported "relaxed" burden abound. In ruling on a railroad's summary judgment motion, the court described the plaintiff's case as "weak" and stated that the evidence "cast substantial doubt on the ability of Plaintiff to meet even the low bar of proof required in a FELA case." *Kreig v. CSX Transp., Inc.*, 2006 WL 2792406, at *2 (W.D. Ky. 2006). Nevertheless, the court denied the motion. The court based its ruling on its view that the "[p]laintiff's burden is significantly lighter than in an ordinary negligence case," with its comments strongly suggesting that the outcome would have been different had this not been a FELA action. *Id.*

In *Davis v. CSX Transp., Inc.*, 2005 WL 1935676, at *1 (W.D. Ky. 2005), the Court explained that the "burden of proof of causation under FELA is relaxed compared to ordinary negligence actions" and therefore the plaintiff "need offer little more than a scintilla of evidence that the employer's negligence played any part in the plaintiff's injury." As a result, the Court dispensed with the need for the plaintiff to offer evidence connecting the alleged negligent conduct (allowing pools of grease to accumulate in the yard) to her injury (losing her footing and falling off a boxcar sill step), and denied the railroad's motion for summary judgment. *Id.* at *2.

In *Koller v. Burlington Northern Santa Fe Ry. Co.*, No. CIV S-01-914 GGH (E.D. Calif. 2002), the plaintiff brought a FELA action based on his employer's failure to prevent an assault by a third party. The Court evaluated the railroad's motion for summary

judgment under the premise that "[i]n a FELA case, the causation standard is relaxed" and "the jury's power to engage in inferences is significantly broader than in common law negligence actions." Examining the evidence in the context of these legal conclusions, the court denied the railroad's motion "given the weakened causation standard in FELA cases."

Even in the rare instance where a trial court grants a defendant's dispositive motion in a FELA case, where courts apply a relaxed standard of causation and negligence such rulings typically do not survive appellate review. For example, in *Booth v. CSX Transp., Inc.*, 211 S.W.3d 81, 84 (Ky. App. 2006), the trial court granted summary judgment for the railroad, finding that "it does not appear that the testimony of either of Plaintiff's physicians provides the necessary testimony stated within a reasonable degree of medical probability to establish causation on the part of CSX." However, the Kentucky Court of Appeals reversed, no doubt influenced by its view that "Congress intended FELA to be a departure from common law principles of liability . . ." and that "FELA plaintiffs have a lower standard of proof than plaintiffs in ordinary negligence cases." *Id.* at 83-84.

Not only is application of a "relaxed" causation standard often outcome determinative, the lack of uniformity that prevails is unlikely to resolve itself. This Court's decision in *Sorrell* may have extinguished the notion that a different standard of causation applies to employer negligence than to employee contributory negligence; however, post-*Sorrell* decisions offer scant reason to believe that *Sorrell* will impact the outlook of lower courts on the more fundamental issues of the substantive standards of causation and negligence in FELA cases.

For example, the Fifth Circuit asserted that the relaxed burden FELA purportedly places on plaintiffs calls for courts to handle FELA cases differently than other common law negligent actions, explaining that "the FELA 'complete absence of probative facts' standard is in sharp contrast to the more demanding test applicable in *other* civil cases." *Howard v. Canadian Nat'l/Illinois Cent. R.R.*, 233 Fed. Appx. 356, 357 (5th Cir. 2007). Similarly, a federal court in Louisiana summarized the judicial attitude about FELA cases when it found that "FELA plaintiffs can survive dispositive motions by offering evidence which would be insufficient to overcome a similar motion in an ordinary civil case." *Kansas City Southern Ry. Co. v. Nichols Construction Co.*, 574 F.Supp.2d 590, 594 (E.D. La. 2008). *See also Medwig v. Long Island R.R.*, 2007 WL 1659201 (S.D.N.Y. 2007)(adhering to Second Circuit precedent which holds that both a relaxed standard of causation and negligence applies in FELA cases, finding that *Sorrell* did not overrule that precedent). Clearly, lower courts remain in need of guidance. *See e.g., Mills v. CSX Transp., Inc.* 2009 WL 4547685, at *5, n. 4 (Tenn. 2009) ("It is not entirely clear which standard of causation *Rogers* applies to FELA cases—the common law standard or a relaxed standard."); *Montgomery supra* ("[T]he *Sorrell* Court did not establish precisely what the FELA standard for causation is." 656 S.E.2d at 27.); *Hall v. Norfolk Southern Ry. Co.*, 2007 WL 2765540, at *6, n.2 (N.D.Ga. 2007) ("With respect for [sic] a standard of causation, the Supreme Court continues to debate the precise contours of its holding in *Rogers*.")

The "relaxed" standard that has become entrenched in many jurisdictions will continue to impact numerous cases in the future. Several thousand FELA lawsuits are filed each year. Except in the

occasional case where the railroad defendant admits liability, negligence and causation are elements of the plaintiff's case in each such lawsuit. The "relaxed" standards utilized by some courts will continue to make recovery of damages more likely—often virtually assured—in FELA cases, as many courts will continue to see FELA's overarching purpose as promoting recovery. *See Baker v. Baltimore & Ohio R.R.*, 502 F.2d 638, 641 (6th Cir. 1974) ("FELA's liberal purpose must be kept in mind when confronting arguments that would restrict an employer's liability under the Act.") However, while many courts may believe that guaranteed recovery for rail employees injured on the job is good public policy, it was not Congress's intent to guarantee recovery in all cases.

B. FELA Was Meant to Incorporate Common Law Concepts of Negligence, Including Proximate Cause

When FELA was enacted there was little reason to foresee that the concepts of negligence and causation, fundamental elements of the statutory remedy, would elude clear definitions so far into the future. Since *Rogers*, however, some courts have discerned a legislative intent that nowhere appears in the statute or legislative history. *E.g., Hausrath v. N.Y. Cent. R.R.*, 401 F.2d 634, 637 (6th Cir. 1968)("Congress deliberately adopted a negligence standard different from that of the common law."); *Magelky v. BNSF Ry. Co.*, 579 F.Supp.2d 1299, 1305 (D.N.D. 2008) ("FELA's most distinctive departure from the common law is in the area of causation. . . . To impose liability on the defendant, the negligence need not be the proximate cause of the injury.") Curiously, Congress never saw fit to mention this so-called "distinctive" and "deliberate" departure from common law.

Congress enacted FELA in 1908 in response to what was perceived as an intolerably high injury rate in the railroad industry.[4] At that time, the concept of no-fault workers' compensation—today the predominant method of compensating workplace injuries—had not yet gained a foothold in the United States. Therefore, Congress adopted what was then the universal compensation model in the United States: the law of negligence. The policy embodied in FELA was straightforward: railroads were to be liable in damages for injuries sustained by their employees in the course of their railroad employment when such injuries were caused by the negligence of the railroad. 45 U.S.C. §51.

FELA embraced the concept of common law negligence, while expressly modifying some of the harsher aspects of nineteenth century common law which often erected insurmountable barriers to recovery by workers sustaining job-related injuries.[5] To ameli-

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[4] In the year ending June 30, 1907, 4,534 rail workers were killed on the job and 87,644 were injured. Interstate Commerce Commission, Statistics of Railways in the United States 1908, 41, 99 (1909). On several occasions at the end of the previous century, President Harrison had admonished Congress to act to protect rail employees, a plea which resulted in enactment of the Safety Appliances Act, c. 196, 27 Stat. 531 (1893), the first federal railroad safety legislation. *See Johnson v. Southern Pac. Co.*, 196 U.S. 1, 19 (1904).

[5] For example, recovery was denied if the worker knew the inherent dangers of a job and assumed those risks by accepting employment. *E.g., Clark v. St. Paul & Sioux City R.R.*, 9 N.W. 581 (Minn. 1881); *Gibson v. Erie Ry. Co.*, 63 N.Y. 449 (1875). The fellow servant rule, a variant of the assumption of the risk doctrine, held that among the ordinary risks of employment the employee takes upon himself is the "carelessness and negligence of those who are in the same employment," on the theory that "these are perils which the servant is as likely to know, and

orate the harsh results which often were a consequence of prevailing legal doctrines, Congress made several specific changes to existing common law. For example, in an effort to promote recovery, the defenses of assumption of the risk and the fellow servant doctrine were eliminated. 45 U.S.C. § 54; *See also Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916).[6]

Additionally, in what, for the time, was a significant innovation in tort law, FELA incorporated the doctrine of comparative fault. The prevailing rule in the United States in the nineteenth century was that contributory negligence by the plaintiff completely barred recovery, even if the defendant also was at fault. *E.g., Louisville, Nashville & Great Southern R.R. v. Fleming*, 82 Tenn. 128 (Tenn. 1884) ("In England and a majority of the States of the Union, the negligence of the plaintiff which contributes to the injury is held to be an absolute bar to the action.") Under FELA, rather than completely barring recovery, if the employee's negligence contributes to the injury damages are reduced in proportion to the employee's negligence. 45 U.S.C. §53.[7]

Despite Congress' decision to modify or eliminate some of the prevailing common law defenses, there is

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against which he can as effectually guard, as the master." *Farwell v. Boston & Worcester R.R.*, 4 Metc. 49, 57 (Mass. 1842).

[6] Initially, FELA eliminated the assumption of the risk defense only in cases where the railroad violated a safety statute. In 1939, Congress amended FELA to eliminate the assumption of the risk defense in all FELA cases. Act of Aug. 11, 1939, c. 685, §1, 53 Stat. 1404. *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 65 (1943).

[7] Contributory negligence is not considered if the injury is caused by violation of a safety statute.

no evidence that Congress believed it was modifying the core concept of negligence that underlies the statute. Contemporaneously with the statute's enactment, the Senate reported that FELA "revises the law as now administered in the courts in the United States in four important particulars." S. Rep. No. 460, 60th Cong., 1st Sess. 1 (1908). Specifically, the Senate Report described these revisions to the common law as addressing the fellow servant doctrine, assumption of the risk, contributory negligence and prohibiting contracts that relieve the employer of liability. *Id.* at 1-3. There was no suggestion whatsoever that the standards of causation or negligence were being modified. The House of Representatives offered an identical list when it described how FELA "change[d] the common-law liability of employers," H.R Rep. No. 1386, 60th Cong. 1st Sess. 1 (1908), noting in addition, that the FELA "makes each party responsible for his own negligence and requires each to bear the burden thereof." *Id.*

Similarly, this Court's understanding of the revisions of common law made by FELA did not include any modification to the standard of causation. Shortly after its enactment, the constitutionality of FELA was challenged. Among other arguments advanced by those challenging the statute was that in modifying the common law Congress exceeded its authority to regulate interstate commerce. In addressing this challenge, which it rejected, this Court described those modifications as including (1) the abrogation of the fellow servant rule; (2) the replacement of the contributory negligence rule with a scheme of comparative negligence; (3) the abrogation of the assumption of the risk doctrine where a violation of a safety statute caused the injury; and (4) the right of a personal representative to seek

damages for the death of an employee for the benefit of designated relatives. *Mondou v. N.Y., N.H. & Hartford R.R.*, 223 U.S. 1, 49-50 (1912). Again, nowhere was it suggested that replacement of the proximate cause standard by a more "relaxed" causation requirement was among FELA's modifications to the common law.. In *Sorrell*, this Court again "catalogued" the ways in which FELA departed from the common law, stating only that FELA "abolished the fellow servant rule, rejected contributory negligence in favor of comparative negligence, prohibited employers from contracting around the Act, and abolished the assumption of risk defense." 549 U.S. at 168.

Indisputably, when Congress enacted FELA it attempted to make recovery more likely than would have been the case under the prevailing law. However, it is equally indisputable that Congress envisioned that the remedy available under FELA would be consistent with the common law concepts of causation and negligence, a point consistently recognized by this Court in the decades immediately following FELA's enactment.[8] *See e.g., Southern Ry. v. Gray*, 241 U.S. 333, 339 (1916) (The rights and obligations under FELA "depend upon applicable principles of common law. . . . Negligence by the railroad is essential to a recovery.") Consistent with that approach, in the years following FELA's enactment, this Court issued a number of decisions confirming

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[8] This Court has recognized that FELA's purpose of promoting recovery is not incompatible with proximate cause. *Brady v. Terminal R.R. Ass'n.*, 303 U.S. 10, 15 (1938) ("The statute has been liberally construed 'so as to give a right to recovery for every injury the proximate cause of which was a failure to comply with a requirement of the [Safety Appliance] Act.'")

that proximate cause is the applicable causation standard under FELA. *See e.g., Lang v. N.Y. Cent. R.R.*, 255 U.S. 455, 461 (1921); *St. Louis-S.F. Ry. v. Mills*, 271 U.S. 344, 347 (1926); *Northwestern Pac. R.R. v. Bobo*, 290 U.S. 499, 503 (1934).

In fact, during the first half of the twentieth century, this Court continued to articulate the traditional common law concepts of negligence and causation as the proper standards under FELA. *E.g., Tennant v. Peoria & Pakin Union Ry. Co.*, 321 U.S. 29, 32 (1944) (The employee has to prove that the railroad's negligence "was the proximate cause in whole or in part of the fatal accident."); *Bailey v. Cent. Vermont Ry.*, 319 U.S. 350, 352 (1943) (FELA has "been largely fashioned from the common law [citation omitted] except as Congress has written into the Act different standards." The employer's duty is "to use reasonable care."); *Coray v. Southern Pac. Co.*, 335 U.S. 520, 523 (1949) (Petitioner was entitled to recover if the "defective equipment was the sole or a contributory proximate cause of the decedent employee's death."); *Urie v. Thompson*, 337 U.S. 163, 182 (1949) (FELA "is founded on common-law concepts of negligence and injury."); *Wilkerson v. McCarthy*, 336 U.S. 53, 61 (1949) (Negligence is "what a reasonable and prudent person would have done under the same circumstances.")

Rather than repudiating these cases, *Rogers* cited to some with approval. 352 U.S. at 506. n.11 (citing to *Coray*). Nonetheless, several federal courts of appeals, which previously had understood FELA to incorporate proximate cause, have concluded that *Rogers* requires that they repudiate their previous

holdings.[9] *See e.g., Richards v. Consolidated Rail Corp.*, 330 F.3d 428 (6th Cir. 2003) (holding that *Rogers* "announced a relaxed test for establishing causation in FELA cases," *id.* at 433, and rejecting prior Sixth Circuit decision in *Reetz v. Chicago & Erie R.R.*, 46 F.2d 50 (6th Cir. 1931), as "no longer good law in light of *Rogers*." *Id.* at 437); *Compare Anderson v. Baltimore & Ohio R.R.*, 89 F.2d 629, 630 (2nd Cir. 1937) (The issue is whether the defect "was the proximate cause of [plaintiff's] death.") *with Nicholson v. Erie R.R.*, 253 F.2d 939, 940 (2nd Cir. 1958) ("[T]o impose liability on the defendant, the negligence need not be the proximate cause of the injury."); *Larsen v. Chicago & Northwestern Ry. Co.*, 171 F.2d 841,844 (7th Cir. 1949) ("To recover under [FELA] plaintiff must prove that the defendant was negligent and that such negligence in whole or in part was the proximate cause of his injuries.") *with Coffey v. Northeast Ill. Reg. Comm. R.R.*, 479 F.3d 472, 476 (7th Cir. 2007)("relaxation of common law standards of proof applies to" causation). Some courts have asserted that *Rogers*' purported introduction of a relaxed causation standard was to conform to the 1939 amendments to FELA. *Richards supra*, 330 F.3d at 434; *Morrison v. N.Y. Cent. R.R.*, 361 F.2d 319 (6th Cir. 1966).

The *Rogers* opinion references the 1939 amendments, 352 U.S. at 509-10, but never suggests that they required a reexamination of the causation standard under FELA, for the simple reason that they did

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[9] The Tenth Circuit explained that "[d]uring the first half of this century, it was customary for courts to analyze liability under the FELA in terms of proximate causation," but that *Rogers* "definitively abandoned this approach." *Summers v. Missouri Pac. R.R. Sys.*, 132 F.3d 599, 606 (10th Cir. 1997).

not. The 1939 amendments were primarily intended to ease the path toward recovery by FELA plaintiffs by modifying aspects of the statute that served to prevent injured employees from recovering, either because they could not meet the strict test of interstate commerce[10] or because the employer successfully argued that the employee had assumed the risks inherent in the employment. However, the 1939 amendments did not purport to address, let alone modify, the standard of causation.

Adding a provision to section 1 of FELA, the 1939 amendments expanded the scope of FELA's coverage so that workers would no longer have to prove they were engaged directly in interstate commerce at the time they were injured in order to come within the scope of FELA's coverage. Act of Aug. 11, 1939, c. 685, §1, 53 Stat. 1404; *see* S. Rep. No. 661, 76th Cong., 1st Sess. 2-3 (1939); *see Southern Pac. Co. v. Gileo*, 351 U.S. 493 (1956); *Reed v. Pennsylvania R.R.*, 351 U.S. 502 (1956). In addition, in 1939, Congress amended FELA to eliminate the defense of assumption of the risk in all cases. *Id.* The 1939 amendments also increased the statute of limitations under FELA from two to three years, *id.* at §2, and prohibited railroads from establishing and enforcing rules which penalized employees for giving information concerning an accident to the injured person or his representative. *Id.* at §3. Tellingly, a railroad employee representative did not believe that Congress had eliminated the need for employees to

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[10] In order to recover, "the employee, at the time of the injury," had to be "engaged in interstate transportation, or in work so closely related to it as to be practically a part of it." *Shanks v. Delaware, Lackwanna & Western R.R.*, 239 U.S. 556, 558 (1916).

prove proximate cause when FELA was enacted in 1908, nor did he urge Congress to do so in 1939. In testimony before the House of Representatives, the General Counsel of the Brotherhood of Railroad Trainmen commented that it was unnecessary to add the word "proximately" to a provision of the act, explaining that such language would be "pure surplusage, because unless the negligence proximately caused the injury there can be no recovery."[11] Thus, there is no statutory basis for incorporating into FELA a standard of causation that differs from what Congress intended in 1908. That lower courts would suggest otherwise underscores the vital need for this Court directly to address the important issue of causation under FELA.

While many lower courts have lost sight of Congress' intent in enacting FELA, a key aspect of the *Sorrell* rationale supports the position that Congress never intended to modify the common law standard of causation. *Sorrell* held that the causation standard for employee contributory negligence was equivalent to the standard for employer negligence. 549 U.S. at 171. This Court based its decision in part on the fact that under common law the same standard of causation applied to both employer and employee negligence, which, it explained, was "strong evidence against Missouri's disparate standards." *Id.* at 168. As with the principle of equivalence of standards, proximate cause also was the common law rule when FELA was enacted. It would be curious

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[11] *Hearings on H.R. 4988 and H.R. 4989 Before the House Comm. on the Judiciary*, 76th Cong., 1st Sess. (1939) (statement of Tom J. McGrath, General Counsel, Brotherhood of Railroad Trainmen).

indeed to find that Congress adopted the common law rule of equivalence but rejected the equally entrenched common law rule of proximate cause without any statutory basis for doing so. In *Sorrell*, the plaintiff argued that use of the term "in whole or in part," in section 1 of FELA, but not in section 3, signaled that each section incorporated a different standard of causation, with section 1, which addresses employer negligence, calling for a more relaxed standard. This Court rejected that argument. In fact, *Sorrell* confirms that the "in whole or in part" language—the alleged statutory basis for the elimination of proximate cause—simply is descriptive of FELA's comparative negligence standard, under which the employer's negligence need not be the sole cause of an injury for the employer to be liable for damages (albeit, reduced damages if the employee's negligence also contributes to the injury). 549 U.S. at 170-71.

* * *

In recent years, this Court has properly resisted entreaties to allow FELA's "remedial and humanitarian" purposes[12] to trump the language of the statute and Congress' intent. *Sorrell*, 459 U.S. at 171. ("It does not follow . . . that this remedial purpose requires us to interpret every uncertainty in the Act in favor of employees.")[13] However, taking a different

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[12] "FELA is 'a remedial and humanitarian statute.'" *Mounts v. Grand Trunk Western R.R.*, 198 F.3d 578, 580 (6th Cir. 2000).

[13] In *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), this Court rejected the Third Circuit's decision to disregard common law limitations on recovery for negligent infliction of emotional distress in order to promote FELA's preference for a liberal recovery. Instead, the Court held that FELA required application of the common law zone of danger test, a test which

path, many lower courts have transformed FELA into a compensation hybrid—unlike any system in the nation—with a relaxed liability standard often all but assuring recovery, but, unlike workers' compensation laws, with full tort damages available to plaintiffs. However, that is not the law Congress enacted. This Court should grant certiorari to provide lower courts with much need guidance on the proper standard of causation—a fundamental concept that can have a profound effect on the outcome of virtually every FELA case.

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ultimately resulted in both plaintiffs' claims being rejected. In *Metro North Comm. R.R. v. Buckley*, 521 U.S. 424 (1997), consistent with the policy considerations underlying the common law limitations on emotional distress claims, this Court denied recovery for negligent infliction of emotional distress to an asymptomatic plaintiff who was exposed to asbestos, rejecting plaintiff's argument that the "'humanitarian' nature of the FELA warrants" recovery. 521 U.S. at 438. Earlier, in *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988), this Court rejected the argument that to foster FELA's humanitarian purposes, prejudgment interest be permitted even though it was not available at common law when FELA was enacted.

CONCLUSION

For the reasons stated herein, the petition should be granted.

Respectfully submitted,

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